87-1311

Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

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II. QUESTION PRESENTED

A. Whether the standard of proof predicate for the admission of similar fact evidence under Rule 404(b) Federal Rules of Evidence, is "clear and convincing" or some other standard, a question over which the circuits are divided.

III. LIST OF PARTIES

All parties to the cause of action are included in the caption.

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VI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

The Petitioners, MICHAEL ALAN LAU and BRUCE TAYLOR, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on direct appeal, United States v. Lau/Taylor, 828 F.2d 871 (1st Cir. 1987).

VII. OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit on direct appeal is cited, United States v. Lau, 828 F.2d 871 (1st Cir. 1987) and United States v. Taylor, 828 F.2d 871 (1st Cir. 1987).

VIII. JURISDICTION

The case originated as a criminal prosecution in the United States District Court, District of Puerto Rico. Upon conviction, direct appeal of the final order, judgment and sentence, was timely prosecuted to the United States Court of Appeals, First Circuit, pursuant to 28 U.S.C. §1291. The oral argument panel affirmed with an opinion on 15 September 1987, United States v. Lau/Taylor, 828 F.2d 871 (1st Cir. 1987). Petition for rehearing and suggestion for en banc consideration were timely filed and later denied on 29 October 1987. Extention of time for filing the Petition for Writ of Certiorari was granted by the Supreme Court up to 27 January 1988. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

IX. STATUTES INVOLVED

Rule 404(b), Federal Rules of Evidence

Character Evidence Not Admissible to Prove Conduct: Exceptions; Other Crimes

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

X. STATEMENT OF THE CASE

A.

Petitioners were charged jointly in a superseding indictment dated 28 August 1985 with three offenses, conspiracy to import and possess cocaine with intent to distribute, importation of cocaine, and possession of cocaine with intent to distribute by the grand jury sitting in the District of Puerto Rico. (R-22). The case was tried before a jury in San Juan, Puerto Rico, on 09 December 1985 and concluded on 17 December 1985

with guilty verdicts as to each defendant on all counts. Petitioner LAU was sentenced on 03 March 1986 to a term of 35 years and a committed fine of sixty thousand dollars ($60,000.00). (R-104). Petitioner TAYLOR was sentenced to a total term of incarceration of 25 years and a committed fine of forty thousand dollars ($40,000.00). (R-117).

Notice of appeal was filed, and appeal was taken to the United States Court of Appeals, First Circuit, where the case was heard on oral argument on 01 June 1987. The judgment of the District Court was affirmed by a written opinion dated 15 September 1987. United States of America v. Lau/Taylor, 828 F.2d 871 (1st Cir. 1987). Rehearing and en banc consideration were denied on 29 October 1987. Associate Justice of the Supreme Court of the United States Honorable Byron R. White on 29 December 1987 extended to and included 27 January 1988 for the filing of this petition upon an application for extention of time within which to file petition for writ of certiorari.

B.

On 09 August 1985 between 1:00 and 1:30 p.m. Gus Maestrales landed an air-ambulance jet at San Juan, Puerto Rico, where he cleared customs. He then met Petitioner MICHAEL ALAN LAU, a helicopter pilot, who approached him and asked about passengers. Mr. Maestrales informed Mr. LAU that the passengers were on the ramp and then identified co-defendant Bruce TAYLOR as one of the passengers. (TR-193). The passengers were accompanied by another man sitting in a wheel-chair and a fourth older gentleman named Marvin.

Mr. Maestrales and his co-pilot, Mr. Paul Roy Levit, discussed that the suitcases were very heavy. Customs officers at the airport were then notified (TR-197, 203) and when one of the bags was opened, cocaine was discovered.

While some fifteen witnesses were called in the case in chief for the government, the principal testimony was that of Thomas William Aiello, who testified about a prior "bad act." He

testified that he had met appellant TAYLOR in January of 1983 in Broxton, Georgia, where he had gone to check an air-strip to see whether it was suitable for landing an airplane. (TR-445). Mr. Aiello also testified that he had met Mr. LAU on the previous date in August of 1982 when he had handed Mr. LAU a check and had a couple of drinks. Mr. Aiello told the jury over the timely and specific objection of defense counsel that the incident had not been proven by the predicate "clear and convincing" evidence standard (TR-425), that an airplane piloted by Mr. LAU had landed in Broxton, Georgia. The plane had gotten stuck in the mud, and Mr. Aiello, and allegedly Mr. TAYLOR and Mr. LAU had tried to get the plane unstuck for about an hour and a half. When they could not get the plane out of the mud they all drove in two trucks to different locations where they later met at a restaurant. Mr. LAU and another individual, Douglas Brezinski, were allegedly discussing payment. Mr. Aiello stayed with Mr. LAU for another hour and a half to two hours. The

physical descriptions given initially by Mr. Aiello were considerably different from the persons of the defendants. (TR-515, 580, 581). Mr. Aiello initially failed to identify Mr. LAU from photographs shown by the DEA. (TR-479). While Mr. Aiello testified that the plane landed in the darkness hours got stuck in the mud and remained there (TR-503, 507), no independent evidence was introduced of any plane being found. The testimony of Mr. Aiello was inconsistent and contradictory about description, places, people, and even the timing of the Broxton, Georgia, event (TR-514, 518). Mr. Aiello's testimony was severely compromised by his admission of lying regarding a document (TR-519) and that he was testifying only out of the goodness of his heart. (TR-520).

The Government was then successfully able to persuade the trial court and jury that the suit-cases of cocaine were flown into San Juan in the LAU helicopter and that Mr. LAU and his business partner in the charter service, Mr. TAYLOR, were

responsible for the transporting of the cocaine and bringing it to San Juan where it was to be further delivered to the United States on the jet. All three persons about to board the jet, a man in a wheelchair, an older man (Jacobson) from the helicopter, and Mr. TAYLOR, denied ownership and knowledge of the six suitcases. (TR-215).

In this context the Appellants argued to the United States Court of Appeals, First Circuit, that Mr. Aiello was testifying about an uncharged incident of cocaine importation which allegedly occurred some two years and eight months before the charged offenses. Mr. Aiello was not involved nor did he participate in the offenses which were charged in the indictment.

Specifically Appellants argued at trial (TR 425-437; 489-533) and on appeal that "the trial court failed to make an initial determination and finding that Rule 404(b) prior act evidence had been proven by clear and convincing evidence prior to allowing it to be presented to the jury."

(Initial Brief of Appellant [LAU], page 10.) The issue is squarely before the Court.

XI. REASONS FOR GRANTING THE WRIT

Conflicts Among the Circuits

The authentication standard of Fed. R. Evid. 901(a)[1] requires the prosecution to establish that the defendant committed an offense before that offense can be admitted as evidence of "other crimes, wrongs or acts" under Rule 404(b). See United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982). While it is clear that the government need not prove the defendant guilty of the uncharged "bad act" beyond a reasonable doubt, it is much less clear precisely what burden of proof must be shouldered. "The circuits are in considerable disarray." United States v. Ingraham, 832

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[1] Fed. R. Evid. 901(a) reads: The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

F.2d 229, 234 (1st Cir. 1987). The Supreme Court has now granted certiorari in a case likely to resolve the dilemma. United States v. Huddleston, 811 F.2d 974 (6th Cir.) (per curiam), cert. granted. ____ U.S. ____, 108 S.Ct. 226, 97 L.Ed.2d ____ (1987). But the Supreme Court has not previously spoken on the point.

Cases in at least four circuits require the trial judge to make a preliminary determination that there is "clear and convincing" evidence connecting the defendant to the "bad act" as a condition precedent to admissibility of the evidence. United States v. Estabrook, 774 F.2d 284, 288 (8th Cir. 1985) (government must "prove by clear and convincing evidence the [defendant] committed the extrinsic acts"); United States v. Mascio, 774 F.2d 219, 223 (7th Cir. 1985) ("when evidence of prior crimes is introduced, it must to clear and convincing"); United States v. Baillcaux, 685 F.2d 1105, 1109-10 (9th Cir. 1980) (similar).

Other circuits have adopted a less rigid stance. The Second Circuit has allowed "bad act" evidence when proven by a fair preponderance, specifically rejecting any stricter criterion. United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975), cert. denied, 425 U.S. 958, 96 S.Ct. 1737, 48 L.Ed.2d 202 (1976). The Sixth Circuit agrees with this approach. United States v. Huddleston, 811 F.2d 975-77 (vacating 802 F.2d 874 (1986)); United States v. Ebens, 800 F.2d 1422, 1432 (6th Cir. 1986). The Tenth Circuit has held that "[t]here must be a clear and logical connection between the alleged earlier offense or misconduct and the case being tried." United States v. Biswell, 700 F.2d 1310, 1317-18 (10th Cir. 1983).

Three other circuits have refused to single out such evidence for special treatment, choosing simply to follow the usual convention of Fed. R.

Evid. 104(b).[2] The seminal cause for this proposition is United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc),[3] cert denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Beechum reversed earlier Fifth Circuit precedent which had applied the "clear and convincing" standard to extrinsic offense evidence. Id. at 910, n. 12. Beechum has been followed in at least two other circuits. See, e.g., United States v. Martin, 773 F.2d 579, 582 (4th Cir. 1985); United States v. Edwards, 696 F.2d 1277, 1280 (11th Cir.)[4]

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[2]Fed. R. Evid. 104(b) reads: When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

[3]The Eleventh Circuit is bound by decisions of the former Fifth Circuit rendered prior to 01 October 1981, Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), and by decisions of Unit B of the former Fifth Circuit rendered after that date. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

[4]See fn. #3, supra.

(per curiam), cert. denied, 461 U.S. 909, 103 S.Ct. 1884, 76 L.Ed.2d 813 (1983). "The resultant standard is apparently no more rigorous--and perhaps more lenient--than the preponderance rule." United States v. Ingraham, supra, 832 F.2d at 235. See also United States v. Nahoom, 791 F.2d 841, 845 (11th Cir. 1986). The standards may in fact be functionally equivalent. In Huddleston, for example, a Sixth Circuit panel originally advocated the "clear and convincing" test, see 802 F.2d at 877, but changed its position on rehearing to adopt the preponderance test. 811 F.2d at 977. The panel indicated that it viewed Beechum as fully consistent with the Second Circuit precedent and with the preponderance standard. Id. at 976-77.

The First Circuit from whence Lau/Taylor originated has not chosen among these approaches,

> we note that our recent opinion in Lau[5] eschews "a seperate mechanical evidentiary test" for "bad act" evidence, 828 F.2d at 876, declines to adopt the "clear and convincing" standard, id., and relies on a

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[5]The Petitioner before the Court.

> "sufficient evidence" analysis, id. at 876, distinctly reminiscent of Rule 104(b) and of Beechum and its progeny.

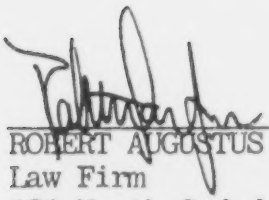
United States v. Ingraham, supra, 832 F.2d at 235.

With the result foreshadowed, ... by Lau, the First Circuit joined with the Fourth, Fifth and Eleventh Circuits on this point. United States v. Ingraham, supra, 832 F.2d at 235.

XII. CONCLUSION

With confidence it may be said that the issue would have been decided differently in another circuit. Had the issue been decided differently, the very outcome of the case would have been decided differently. The certainty of the criminal justice system decries such a result. The disproportionality can be resolved by the Supreme Court granting the writ and addressing the merits of the Petitioners' argument which relief is requested.

Respectfully submitted,



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